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APR 5 1929
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No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1928

ROY O. WEST, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

U.S. GOVERNMENT PRINTING OFFICE : 1929

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PETITION

The Attorney General, on behalf of the Secretary of the Interior, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia entered in the above-entitled cause on January 7, 1929 (R. 52), reversing the judgment of the Supreme Court of the District of Columbia (R. 39).

STATEMENT

The question presented is whether Section 37 of the Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C., Title 30, Section 193), supersedes as to coal, phosphate, sodium, oil, oil shale,

and gas locations those provisions of Sections 2324 and 2325, Revised Statutes (U. S. C., Title 30, Sections 28, 29), which authorized locators of placer mining claims, in case of default in assessment work during any one year, thereafter but before re-location to resume and complete all necessary work to entitle them to a patent for their claims.

The relator sought by mandamus to compel the Secretary of the Interior to issue a patent.

The petition alleges that on October 1, 1919, the plaintiff and several other citizens located an oil shale placer mining claim known as Spad No. 3, in Garfield County, Colorado. (R. 2.) This claim was one of a group of six known as Spad Placer Claims Nos. 1 to 6, inclusive, adjacent to each other and all owned by the plaintiff and his associates. The plaintiff and his co-locators performed on Spad Placer Claims Nos. 4, 5, and 6 annual labor of the total value of more than $600 for the assessment year 1920, intending, so it is averred, such labor to be for the entire group of six claims. (R. 2.) Thereafter the plaintiff acquired the interest of his co-locators in Spad Claim No. 3, and in 1921 and 1922 expended $100 annually in labor and improvements, further expenditures being later made on the same claim, until in the aggregate it amounted in value to $500. (R. 2.)

On September 25, 1922, plaintiff applied for a patent to Spad Placer Claim No. 3. No other person has attempted to make location of this placer

claim, and no contest to the plaintiff's ownership of the claim has been instituted by anyone, except that after he had filed his application for patent contest proceedings were instituted by officers of the Interior Department before the District Register and Receiver. On hearing of the contest, all of the charges made by the contestants against the claim were disposed of in favor of the plaintiff except the one as to insufficiency of the annual labor on Spad Claim No. 3, for the assessment year 1920 (R. 4), and on this ground alone the Commissioner of the General Land Office held the claim to be null and void. This holding was approved by the Secretary of the Interior. (R. 5.)

The Secretary determined that in the absence of evidence showing the character of the work done on Spad Claims 4, 5, and 6, and its relation to Spad Claim No. 3, no consideration would be given to mere statements of intent that such work on the adjoining claims was intended to include all necessary work for the year 1920 on Spad Claim No. 3, because such contention of the plaintiff is not "considered to be law nor in harmony with the decisions of the Department or the courts." The Secretary found as a fact that the annual labor performed on the claims adjoining Spad Claim No. 3 was not performed with any intent that it was to be a part of a general scheme of development of the claims as a group. (R. 3.) The opinion of the Secretary, which is made a part of the plaintiff's petition, holds that the work done on Spad Claims 4, 5,

and 6 "has not been shown as having a tendency in anywise to develop the claims as a group; nor has it been shown that they were made in furtherance, or are a part of a general scheme to develop the claims as a group." (R. 5, 22.)

The plaintiff then applied to the Secretary of the Interior for a rehearing, which was allowed. (R. 5.) Thereafter the Secretary affirmed his previous decision. (R. 36.) The second opinion of the Secretary is to be found at pages 22–36 of the record.

The Secretary of the Interior, in answer to plaintiff's petition, alleged—

(1) That the plaintiff, with the aid of counsel, has been afforded a fair and complete hearing; that as disclosed by plaintiff's petition the decision reached by him was not the result of arbitrary or capricious action, and that it is final, and not reviewable or subject to review or modification by any court. (R. 37.)

(2) The plaintiff's petition discloses that he has failed to maintain his original right to the claim in question in having omitted to perform the necessary labor at the time provided by law, thereby causing the claim to lapse; that in such circumstances the Leasing Act of February 25, 1920, prevented the plaintiff from thereafter reviving and reinstating his original lapsed claim; in effect withdrew the land from operation of the mining laws under which the claim had been initiated and

placed it entirely and wholly under the provisions of the Leasing Act of 1920. (R. 38.)

The Supreme Court of the District of Columbia dismissed the plaintiff's petition, without opinion. (R. 39.) This judgment was reversed by the Court of Appeals of the District of Columbia. (R. 43–52.) The Court of Appeals entered judgment on January 7, 1929, and it is to review this judgment that the writ of certiorari is now sought.

SPECIFICATIONS OF ERROR

I. The Court of Appeals erred in directing the Secretary of the Interior to issue to Krushnic a patent.

II. The Court of Appeals erred in holding that Section 37 of the Leasing Act of 1920 did not supersede Sections 2324 and 2325, Revised Statutes, and take away the right of the locator to resume work after he had defaulted in annual assessment work.

III. The Court of Appeals erred in holding that, under the excepting clause of Section 37 of the Leasing Act of February 25, 1920, the plaintiff had a valid claim to the land in question at the date of the passage of that Act and that it was thereafter maintained by him in compliance with the laws under which the placer claim was initiated, thereby giving to him a vested right to a patent.

IV. The Court of Appeals erred in holding that Section 37 did not restore the land to the public domain upon the happening of the default in an-

nual assessment work and thereafter make it subject to disposition solely under the Leasing Act of 1920.

V. The Court of Appeals erred in holding that the United States is not the owner of the tract involved.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has misconstrued Section 37 of the Leasing Act of 1920 in holding that it did not supersede Sections 2324 and 2325, Revised Statutes, withdraw the land from the public domain, and thereby take away the right of a locator to resume possession and begin work after he has defaulted in annual assessment work.

2. The Court of Appeals has decided questions of law important to the executive departments charged with the administration of public lands, national forests, and naval reserves; and the proper construction of Section 37 of the Leasing Act of February 25, 1920, is fundamental in adjudicating claims arising under the general mining laws. Many claims similar in character to the one involved here and involving thousands of acres of land are awaiting adjudication until final disposition is made of this case. The questions involved are of general importance and substance relating to the construction of statutes which have not been, but should be, settled by this Court, in order that the respective rights of citizens and the United States, in matters relating to the mining laws of the United

States, be properly determined in accordance with the intent of Congress.

WILLIAM D. MITCHELL,
Attorney General.

APRIL, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS

No opinion was written by the District Court. (R. 39.)

The opinion of the Court of Appeals has not yet been reported, but is in the Record at pages 43–52.

JURISDICTION

The judgment of the Court of Appeals was entered January 7, 1929. (R. 52.) Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether Section 37 of the Leasing Act of February 25, 1920 (a) took away, upon default in annual assessment work, the right of a locator of an oil shale placer mining claim, initiated under the general mining laws of the United States, to resume possession and perform assessment work to the extent necessary to entitle him to a patent under the initiating statute, and (b) in effect withdrew the lands from private acquisition except in accordance with the Leasing Act of 1920.

THE STATUTES

The relevant provisions of the statutes involved are:

Section 37 of the Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C., Title 30, Section 193):

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, *except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.* (Italics ours.)

Section 2324, Revised Statutes (U. S. C., Title 30, Section 28):

> * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such

> failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

Section 2325, Revised Statutes (U. S. C., Title 30, Section 29), provides the procedure for obtaining a patent when—

> * * * five hundred dollars' worth of labor has been expended or improvements made upon the claim * * *

by the locator.

STATEMENT

The facts are sufficiently stated in the petition for certiorari.

ARGUMENT

SECTION 37 OF THE LEASING ACT OF 1920 OPERATED AS A WITHDRAWAL OF THE LAND WHEN LOCATOR DEFAULTED IN MAKING ANNUAL EXPENDITURES AND CUT OFF HIS RIGHT TO REPOSSESS AND RESUME ASSESSMENT WORK UNDER SECTION 2324, REVISED STATUTES

Section 2324 authorized citizens to enter upon the public domain, to make discovery of minerals, and upon discovery to make location and perform "not less than one hundred dollars' worth of labor * * * or improvements * * * during each year" until patent issues. It then provides that if the locator shall fail to comply with those conditions, the claim shall be subject to relocation in the same manner as if no location had been made, "provided that the original locators * * * have not

resumed work upon the claim after failure and before such location."

Discovery and location *vest* in the locator an exclusive possessory right in the land under Section 2322, Revised Statutes, but the assessment work is a condition subsequent prescribed by Congress to be performed in order to preserve the exclusive right to the possession of a valid mineral-land location upon which discovery has been made, *Union Oil Company* v. *Smith,* 249 U. S. 337, 350, and failure thereof by the locator, whether he remained in possession or not, terminated his right to possession and interest in the claim. *Black* v. *Elkhorn Mining Company,* 163 U. S. 445, 450. The right of relocation by others in case of default by the original locator was in effect a penalty imposed by Congress to compel him to be diligent in performing the requisite amount of assessment work upon the claim. However, he still had the right under Section 2324 at any time after default to resume annual assessment work, provided the claim had not been relocated prior to the resumption of work, or that before or during the time of the default the land had not been withdrawn by the United States. *Hodgson* v. *Midwest Oil Company,* 17 F. (2d) 71, 76–77 (Executive order withdrawing mineral lands); *Interstate Oil Corporation* and *Frank Crittenden,* 50 L. D. 262 (Executive order withdrawing mineral lands); *E. C. Kinney,* 44 L. D. 580 (Executive order withdrawing lands for reclamation purposes).

The theory of the rule laid down in those cases is that the right of the original locator to repossess the land and resume work after he has defaulted in annual assessment work is a matter of *grace*, subject always to termination by the United States, as by withdrawing the land from the public domain.

By the Leasing Act of February 25, 1920, Congress established an entirely new policy in dealing with certain classes of mineral lands including oil shale. Where under the old mining laws a citizen had the right to enter at will upon the public domain and make discovery and location leading ultimately to the acquisition of title to the mineral land, he must now, under the Leasing Act, first obtain a permit to explore a specified area, and upon discovery becomes entitled to a lease to operate it, provided he has fulfilled the other conditions prescribed by the Act.

Another important feature is that the new Act provided that the United States should derive revenue and other benefits from the public lands containing minerals of the character described in the Act, including oil shale. In other words, it cut off private acquisition in fee of such mineral lands.

The decision of the Court of Appeals is not in harmony with the purpose of Congress as expressed in the Leasing Act of 1920. The decision in effect grants to a locator in default in annual assessment work a *vested* right as against the United States to repossess the land *at any time* and resume work

thereon. The practical effect is to allow the locator to reenter the land and resume work at his pleasure and thus indefinitely postpone the completion of work necessary to the issuance of patent. This would operate to deprive the United States of revenue and other benefits contemplated by the Leasing Act of 1920. Moreover, the locator in such circumstances is placed in a position even better than before the passage of that Act, for the reason that the Leasing Act prohibits the location of mineral claims and the private acquisition in fee of mineral lands, thus removing the penalty of relocation by others imposed upon an original locator by Section 2324 in case of his failure to perform the annual assessment work. The Court of Appeals did not consider this situation to be of importance. (R. 46.)

It is manifest that the result flowing from this decision was never intended by the Leasing Act of 1920. Congress undoubtedly intended by that Act to preserve all *vested* rights that had accrued under the earlier statutes and nothing more. The logical interpretation to be given the excepting clause of section 37 in order to carry out the real intent of Congress is that a valid claim is being "maintained in compliance with the laws under which" it was initiated only when the original locator continues faithfully to perform the conditions subsequent prescribed in the initiating statute relative to annual assessment work. It is upon this theory that in *Cronberg* v. *Hazlett*, 51 L. D. 101, it was

ruled that Section 37 of the Leasing Act of February 25, 1920, operated as a continual withdrawal and that a locator thereafter defaulting in his annual assessment work lost the right to repossess the land and resume work upon the claim.

If the decision of the Court of Appeals is allowed to stand unreversed, a vast quantity of mineral lands will be held in possession of original locators at their pleasure and the United States will be deprived of revenue and other benefits to which it is entitled under the Leasing Act of 1920.

In view of this, and of the need for a definite rule of construction of the statute in question for the guidance of the Executive departments charged with the administration of the Acts relating to mineral lands, it is respectfully submitted that the petition for certiorari should be granted in this case.

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RANDOLPH S. COLLINS,
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APRIL, 1929.

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